

1 The Honorable Barbara J. Rothstein  
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7 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

8 COOPER MOORE and ANDREW GILLETTE,  
9 on their own behalf and on behalf of others  
similarly situated,

10 Plaintiffs,

11 v.

12 ROBINHOOD FINANCIAL LLC,

13 Defendant.

No. 2:21-cv-01571-BJR

DEFENDANT ROBINHOOD  
FINANCIAL LLC'S MOTION TO  
DISMISS PLAINTIFFS' AMENDED  
COMPLAINT

*Oral Argument Requested*

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## I. INTRODUCTION

2 Plaintiffs Cooper Moore and Andrew Gillette (together, “Plaintiffs”) bring suit against  
3 Defendant Robinhood Financial LLC (“Robinhood”) over each allegedly receiving a single text  
4 message that invited them to “[j]oin Robinhood,” a commission-free investment brokerage  
5 service, and that offered free stock should they do so. Plaintiffs do not allege that the text  
6 messages were sent by Robinhood; rather they admit that the text messages were sent by their  
7 own friends who happen to be Robinhood users. Plaintiffs do not and cannot allege that  
8 Robinhood controlled whether any particular Robinhood user might or might not have chosen to  
9 send through his or her own mobile device, to any of his or her own personal contacts, at a time  
10 of his or her choice, an invitation to “join Robinhood.” Plaintiffs’ allegations are insufficient to  
11 support their claims under (1) the Washington Commercial Electronic Mail Act (“CEMA”),  
12 RCW 19.190.060; or (2) the Washington Consumer Protection Act (“CPA”), RCW ch. 19.86,  
13 predicated on a CEMA violation. Accordingly, Robinhood moves the Court to dismiss  
14 Plaintiffs’ claims under Federal Rule of Civil Procedure 12(b)(6) with prejudice, for the  
15 following independent reasons:

16       *First*, Plaintiffs fail to plausibly allege that Robinhood provided “substantial assistance”  
17 to the Robinhood users who transmitted referral text messages to Plaintiffs. Instead, Plaintiffs  
18 merely parrot the elements of the statutory definition and fail to support their conclusory  
19 allegations with basic facts. Moreover, the Amended Complaint admits—as it must—that  
20 Robinhood users were solely responsible for deciding whether, when, to whom, and on what  
21 personal device to send the text messages.

22        **Second**, Plaintiffs also fail to plausibly allege that Robinhood provided “substantial  
23 assistance” to anyone it knew or consciously avoided knowing was violating the CPA.  
24 Robinhood may be liable for assisting in the transmission of a text only if it knew or avoided  
25 knowing the Robinhood users sent the text messages at issue *in violation of the CPA* as CEMA  
26 requires. *See* RCW 19.190.010(1). But Robinhood users cannot violate the CPA via a CEMA  
27 violation unless they themselves “conduct[] business in the state.” RCW 19.190.060(1).

1 Plaintiffs' Amended Complaint attempts to hurdle this deficiency by asserting that any person  
 2 that has any financial relationships within Washington State is "conducting business." This  
 3 interpretation is overbroad, would render the requirement superfluous, and is contrary to the  
 4 Washington Legislature's stated intent.

5 **Third**, the Amended Complaint fails to sufficiently allege that the text messages  
 6 Plaintiffs received each constituted a "commercial electronic text message." CEMA limits the  
 7 definition of such a message to those "sent to promote real property, goods, or services **for sale**  
 8 **or lease**." RCW 19.190.010(3). Plaintiffs do not allege facts to sufficiently plead that the text  
 9 messages they received were sent to promote the sale or lease of any real property, goods, or  
 10 services, because an offer of free stock to sign up for Robinhood's commission-free investment  
 11 service—untethered from any sale or lease of real property, goods, or services—cannot  
 12 constitute a "commercial electronic text message" under CEMA.

## 13           **II.       FACTUAL AND PROCEDURAL BACKGROUND**

### 14           **A.       Plaintiff Moore's Initial Complaint and Procedural Background.**

15 Plaintiff Cooper Moore filed his initial Complaint in the Northern District of California  
 16 on August 9, 2021. Dkt. 1 ("Compl."). Moore alleged that Robinhood initiated and/or assisted  
 17 in sending to him a refer-a-friend text message while he was a Washington resident. *Id.* ¶4.  
 18 Moore admitted, however, that Robinhood's text referral program requires that the individual  
 19 Robinhood user, not Robinhood, select the recipient of the text message "from the contacts  
 20 stored **on the user's phone**" and to transmit the text message through the user's own mobile  
 21 device. *Id.* ¶¶ 24, 27 ("the **user has to . . . hit send**") (emphasis added).

22 Robinhood filed a motion to dismiss Moore's Complaint pursuant to Federal Rule of  
 23 Civil Procedure 12(b)(6) on September 16, 2021. Dkt. 21. Having reviewed Robinhood's  
 24 motion to dismiss while it was pending, Moore notified Robinhood that he wished to file an  
 25 amended complaint. The parties conferred and filed a stipulated motion to modify the initial  
 26 case deadlines, which the Court granted on January 7, 2022. Dkts. 48, 49. On February 1, 2022,  
 27 the parties stipulated to the filing of an Amended Complaint while reserving Robinhood's

1 defenses. Dkt. 52. The Court granted that stipulation on February 8, 2022. Dkt. 53.<sup>1</sup> Plaintiffs  
 2 filed their Amended Complaint on February 9, 2022. Dkt. 54 (“FAC”).

3 **B. Plaintiffs’ Amended Complaint.**

4 Plaintiffs’ Amended Complaint adds a new Plaintiff—Gillette—and abandons one of  
 5 Moore’s two theories of liability—that Robinhood “initiated” the refer-a-friend text messages  
 6 Plaintiffs allege that they received. *Compare* Compl. ¶¶ 4, 39, 41(a), 50 *with* FAC ¶¶ 4, 59,  
 7 61(a), 70. Plaintiffs’ claims now rest entirely on their theory that Robinhood “assisted the  
 8 transmission” of these text messages. *See* FAC ¶¶ 67-82.

9 Plaintiffs’ new allegations focus primarily on the text message Gillette alleges he  
 10 received, *id.* ¶¶ 50-58, the locations and employment status of the Robinhood customers who  
 11 allegedly sent referral text messages to Plaintiffs, *id.* ¶¶ 48, 57, some of Robinhood’s revenue  
 12 sources, *id.* ¶¶ 1, 22, 25, 27, Robinhood’s status as a for-profit business, *id.* ¶¶ 1, 23, details  
 13 about the free stock provided to Robinhood customers upon a successful referral, *id.* ¶¶ 2, 23, 27,  
 14 and Robinhood Gold, a premium service offered as a \$5-per-month subscription service that is  
 15 not mentioned at all in the text messages that Plaintiffs allege they received, *id.* ¶¶ 22, 24. The  
 16 Amended Complaint adds no new factual allegations regarding the design and function of the  
 17 Robinhood app or the process by which Robinhood customers can choose whether, when, and to  
 18 whom to send referral text messages from their personal mobile devices—messages that they are  
 19 free to edit just like any other text message. *Compare* Compl. ¶¶ 22-29, 31 (alleging the two  
 20 methods by which Robinhood customers can send referral text messages), *with* FAC ¶¶ 30-37,  
 21 40 (the same, with non-substantive revisions). And, like the initial Complaint, Plaintiffs’  
 22 Amended Complaint admits that Robinhood’s app is free to download, FAC ¶ 1, does not allege  
 23 that Robinhood customers pay Robinhood to set up a Robinhood account, and does not allege  
 24 that the text messages Plaintiffs allegedly received contained any language about any product or  
 25 service that requires a customer to pay anything to Robinhood.

26  
 27 <sup>1</sup> Robinhood files this Motion to Dismiss Plaintiffs’ Amended Complaint in accordance with the deadlines imposed  
 by the Court’s January 9, 2022 order, Dkt. 49 at 3, and within fourteen days of the Court’s order permitting  
 Plaintiffs to file their Amended Complaint, Dkt. 53.

### III. LEGAL STANDARD

**A. Rule 12(b)(6) Motion to Dismiss.**

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual allegations “to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court need not “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.), amended on denial of reh’g, 275 F.3d 1187 (9th Cir. 2001). Nor need the Court accept as true “legal conclusion[s] couched as a factual allegation.” *Roth v. CNR Prods., Inc.*, 2020 WL 5747809, at \*2 (W.D. Wash. Sept. 25, 2020) (Rothstein, J.) (quoting *Twombly*, 550 U.S. at 555). The Court may consider “materials incorporated into the complaint by reference.” *Id.* (quoting *Abcarian v. Levine*, 972 F.3d 1019, 1022 (9th Cir. 2020)). Furthermore, the Court is “not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint.” *Rahman v. Greenpoint Mortg. Funding, Inc.*, 2019 WL 3550314, at \*2 (W.D. Wash. Aug. 5, 2019) (Rothstein, J.) (quoting *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)).

## **B. The Commercial Electronic Mail Act.**

18 CEMA imposes liability for any “person conducting business in the state” who either  
19 (1) “initiate[s]” or (2) “assist[s] in” the “transmission of an electronic commercial text message”  
20 to a telephone number assigned to the cell phone or pager of a Washington resident. RCW  
21 19.190.060(1).<sup>2</sup> CEMA does not provide a private right of action to seek damages for violation  
22 of its restrictions on commercial electronic text messaging. *See Wright v. Lyft, Inc.*, 189 Wn.2d  
23 718, 727 (2017) (“RCW 19.190.040 does not create an independent cause of action for monetary  
24 damages under CEMA.”). Instead, a CEMA violation constitutes an “unfair or deceptive act in  
25 trade or commerce” for purposes of applying the CPA. RCW 19.190.100; *see also Wright*, 189  
26 Wn.2d at 727 (“CEMA’s plain language demonstrates the legislature’s intent that the recipient of

<sup>2</sup> Plaintiffs have abandoned the “initiation” theory. *See supra* § II.B.  
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1 unsolicited text messages bring a CPA claim.”).

2 **IV. ARGUMENT**

3 Plaintiffs fail to allege facts sufficient to establish the elements of their sole remaining  
 4 theory: that Robinhood violated CEMA by “assisting the transmission” of the text messages  
 5 Plaintiffs allegedly received. Plaintiffs fail to adequately allege that: (i) Robinhood provided  
 6 “**substantial** assistance or support” that enabled the senders to “formulate, compose, send,  
 7 originate, initiate, or transmit” the refer-a-friend text messages, RCW 19.190.010(1) (emphasis  
 8 added); (ii) Robinhood “kn[ew] or consciously avoid[ed] knowing” that the senders “engaged, or  
 9 intend[ed] to engage, in any practice that violates the [CPA],” *id.*; **and** (iii) the text messages  
 10 Plaintiffs received were “commercial electronic text messages,” statutorily defined as text  
 11 messages “sent to promote real property, goods, or services **for sale or lease**,” RCW  
 12 19.190.010(3) (emphasis added).

13 **A. Plaintiffs Do Not Allege Sufficient Facts that Robinhood “Substantially  
 Assisted” in Transmitting the Text Messages Plaintiffs Received.**

14 Plaintiffs’ allegations regarding Robinhood’s nominal involvement in sending the referral  
 15 text messages they received are insufficient to state a claim of “substantial assistance” under  
 16 CEMA. As a recent Eastern District of Washington decision confirmed, not every form of  
 17 assistance rises to the level of “substantial assistance” required for liability under CEMA. *Frank*  
 18 *v. Cannabis & Glass, LLC*, 2019 WL 4855378, at \*3 (E.D. Wash. Oct. 1, 2019) (dismissing  
 19 complaint for failure to allege that defendant substantially assisted in transmission of text  
 20 messages). In *Frank*, the court found that the defendant, Springbig, provided some assistance,  
 21 “i.e. the software application used to send the text messages” at issue, but that the plaintiff had  
 22 failed to allege any facts showing it provided *substantial* assistance, “which is required by the  
 23 statute.” *Id.* Instructive here, the court in *Frank* also found no liability under the analogous  
 24 Telephone Consumer Protection Act (“TCPA”), where “[t]here are no allegations that Defendant  
 25 Springbig exercised **any discernible involvement** in deciding whether, when, or to whom the text  
 26

1 message is sent, or what the text message said.” *Id.* at \*2 (emphasis added).<sup>3</sup>

2         *De la Cabada v. Ytel, Inc.*, 2020 WL 1156909 (N.D. Cal. Mar. 10, 2020), addressed  
 3 TCPA “involvement” liability, similar to the “substantial assistance” requirement under CEMA.  
 4 *Id.* at \*4. The *De la Cabada* court first found that the defendant, Ytel, Inc., did not initiate the  
 5 texts and calls at issue. *Id.* Then, in deciding whether Ytel was “otherwise so involved with a  
 6 communication as to be deemed to have made them for TCPA liability purposes” (a standard  
 7 similar to that of “assistance” liability under CEMA), the Court found that the plaintiffs asserted  
 8 “no factual allegations that plausibly support an inference that Ytel created the content of the  
 9 communications, or determined when, how, and to whom the communications were sent.” *Id.*  
 10 The Court noted that the FCC considered several factors in analyzing whether there is sufficient  
 11 involvement in transmission for liability,<sup>4</sup> including: “(1) who creates the content of the  
 12 messages; (2) who decides ‘whether, when or to whom’ a message is sent; (3) ‘the extent to  
 13 which a person willfully enables fraudulent spoofing of telephone numbers or assists  
 14 telemarketers in blocking Caller ID, by offering either functionality to clients’; and (4) ‘whether  
 15 a person who offers a calling platform service for the use of others has knowingly allowed its  
 16 client(s) to use that platform for unlawful purposes.’” *Id.* (quoting *In re Rules & Regulations*  
 17 *Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7980-81 (2015) (“2015  
 18 FCC Order”), abrogated in part on other grounds, *ACA Int’l v. Fed. Commc’ns Comm’n*, 885  
 19 F.3d 687 (D.C. Cir. 2018)). In *Adzhikosyan v. Callfire, Inc.*, 2019 WL 7856759 (C.D. Cal. Nov.  
 20 20, 2019), another TCPA case, the court similarly considered whether the defendant “was so  
 21 involved in placing the call[s] as to be deemed to have initiated [them].” *Id.* at \*2 (quoting 2015  
 22 FCC Order at 7980). The court dismissed the plaintiff’s claim because the plaintiff did not  
 23

24         <sup>3</sup> “Because the TCPA’s prohibition against unsolicited communications advertising property, goods, or services is  
 25 substantially similar to the CEMA prohibition, the Court applies the federal interpretations of the TCPA when  
 26 considering this claim.” *Wick v. Twilio Inc.*, 2017 WL 2964855, at \*5 (W.D. Wash. July 12, 2017); see also *Gragg*  
 27 v. *Orange Cab Co.*, 2013 WL 195466, at \*4 n.4 (W.D. Wash. Jan. 17, 2013) (“interpretive rulings” of the TCPA  
 “should be applied to [CEMA]”).

4 The Court also noted that “involvement” liability generally applies with respect to platforms that facilitate mass  
 calling or texting. *Id.*

1 allege that the defendant decided whether, when or to whom to send the messages at issue. *Id.*

2 Here, like in *Frank* and *Adzhikosyan*, Plaintiffs' allegations are insufficient to establish  
 3 substantial assistance. *Frank*, 2019 WL 4855378, at \*3; *see also Adzhikosyan*, 2019 WL  
 4 7856759, at \*3. Plaintiffs admit that Robinhood had no discernable involvement in deciding  
 5 whether, when, how, and to whom to send the text messages at issue. FAC ¶¶ 31-33. Rather, it  
 6 was Robinhood users who made those decisions. And although Plaintiffs allege that Robinhood  
 7 composed the initial draft content of the text messages, it was Robinhood users that had full  
 8 control over the final content of the messages because the messages were editable and sent  
 9 through the users' mobile devices' native text message applications. *Id.* ¶ 33.

10 Contrasting the facts of cases in which courts found involvement liability was sufficiently  
 11 alleged with Plaintiffs' allegations further highlights their inadequacy. In *Wick*, the court upheld  
 12 the sufficiency of a TCPA pleading where the plaintiff alleged that Twilio, a cloud-based texting  
 13 service provider, created the uneditable messages **and** chose their order and timing, along with  
 14 "what number a message will be sent from in order to prevent messages from being filtered or  
 15 rejected." 2017 WL 2964855, at \*4.<sup>5</sup> In *De la Cabada*, the court ultimately ruled that plaintiffs  
 16 plausibly alleged that Ytel was sufficiently involved with sending the communications at issue  
 17 because of allegations that Ytel assisted with spoofing telephone numbers and blocking Caller  
 18 ID. 2020 WL 1156909, at \*5. By contrast, Plaintiffs here allege no such involvement or  
 19 "assistance" by Robinhood. They do not allege that Robinhood chose the order, timing, or  
 20 sender of the text messages, or provided any other "functionality" that may have aided in  
 21 "fraudulent spoofing" or the like.

22 The Amended Complaint, like Moore's initial Complaint before it, merely alleges—  
 23 correctly—that Robinhood provided its users an opportunity to decide whether to share a chance  
 24 to earn free stock with their own personal contacts. FAC ¶¶ 31-35 & n.10. And, if they so  
 25 chose, whether to do so by email, text message, or other means through their own mobile device.  
 26 *Id.* Robinhood's conduct is not substantial assistance under CEMA.

27<sup>5</sup> Notably, the court in *Wick* twice dismissed the plaintiff's CEMA claim.

1           **B. Plaintiffs Do Not Sufficiently Allege that Robinhood “Kn[ew] or Consciously**  
 2           **Avoid[ed] Knowing” that the Senders of Referral Text Messages to Plaintiffs**  
 3           **Violated or Intended to Violate the CPA.**

4           Robinhood also cannot be liable for substantially assisting in the transmission of a text  
 5           message because Plaintiffs do not allege that Robinhood “kn[ew] or consciously avoid[ed]  
 6           knowing that the *initiator* of the . . . commercial electronic text message is engaged, or intends to  
 7           engage, in any practice that violates the consumer protection act.” RCW 19.190.010(1)  
 8           (emphasis added). In other words, there can be no CEMA liability for “assisting the  
 9           transmission” without the “initiator” either engaging in or intending to engage in a CEMA (or  
 10           other CPA) violation. Furthermore, an “initiator” *must* be “conducting business” in Washington  
 11           when he or she initiates a commercial electronic text message to violate CEMA. RCW  
 12           19.190.060(1). Here, Plaintiffs fail to allege facts demonstrating that Robinhood knew or  
 13           consciously avoided knowing that the users who initiated the referral text messages were  
 14           conducting business in Washington—an essential element to a claim that individuals sending  
 15           referral text messages engaged in a practice that violated CEMA.

16           Plaintiffs’ allegations that the text message senders “conduct[ed] business in  
 17           Washington” all fail. *First*, they allege that the text message initiators conducted business by  
 18           sending referral texts “in order to earn payments for themselves and the Washington-resident-  
 19           recipients of those messages.” FAC ¶ 28. In other words, Plaintiffs seek an expansive  
 20           interpretation of “doing business in Washington” that depends on the subjective intent of a  
 21           sender of a text message. While vastly overinclusive, as discussed below, this conjured standard  
 22           is also irrelevant, as Plaintiffs include no allegations about the intent of those who sent the text  
 23           messages. *See id.* ¶¶ 48-49, 57-58.

24           *Second*, Plaintiffs allege that all Robinhood users who live or work in Washington were  
 25           “conducting business in Washington” at the time they sent the texts by virtue of “1) their own  
 26           contractual relationship with Robinhood as Washington-resident Robinhood users; 2) their use of  
 27           the Robinhood app to transact business with Robinhood as Washington-resident Robinhood  
 28           users; 3) their engagement in other business relationships while residing in Washington,

1 including, for example, their own subscriptions to cellular telephone service, and 4) their own  
 2 employment in the state of Washington.” *Id.* ¶ 29. Plaintiffs allege that the person who sent  
 3 Moore a referral text message was “conducting business” in Washington because she was “self-  
 4 employed in Washington at the time she sent the text message” and was “a Robinhood user,  
 5 using the app, and maintaining a phone number in the state.” *Id.* ¶¶ 48-49; *see also id.* ¶¶ 57-58  
 6 (making similar allegations regarding the sender of the referral text message Gillette received).

7 The Court should reject these “legal conclusion[s] couched as . . . factual allegation[s].”

8 *Roth*, 2020 WL 5747809, at \*2 (quoting *Twombly*, 550 U.S. at 555). Plaintiffs’ interpretation of  
 9 CEMA’s “conducting business” requirement is vastly overbroad and would include nearly every  
 10 Washington resident, subjecting them to CEMA “initiator” liability—and the accompanying  
 11 statutory damages for a CEMA-based CPA claim—any time they send a text message to a friend  
 12 or family member that speaks favorably of a product or service for sale or lease. This  
 13 interpretation violates basic principles of statutory construction. Washington courts observe “the  
 14 rule against surplusage, which requires this [C]ourt to avoid interpretations of a statute that  
 15 would render superfluous a provision of the statute.” *In re Est. of Mower*, 193 Wn. App. 706,  
 16 720 (2016) (quoting *Veit ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 113  
 17 (2011)). By drawing in nearly every Washington resident, Plaintiffs’ reading of CEMA would  
 18 render CEMA’s “conducting business” requirement superfluous. Moreover, accepting Plaintiffs’  
 19 interpretation would render the statute unconstitutionally vague and overbroad, as it would  
 20 “leave[] wide open the standard of responsibility, so that it is easily susceptible to improper  
 21 application.” *Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (holding Georgia statute making it a  
 22 crime to use language tending to cause a breach of the peace was unconstitutionally vague and  
 23 overbroad).

24 Plaintiffs’ interpretation also contradicts the legislative record, which shows that  
 25 lawmakers intended CEMA to prohibit **businesses** in Washington from sending unsolicited text  
 26 messages that market **those businesses**’ products or services for sale. Committee materials and  
 27 bill reports for House Bill 2007, which was codified as CEMA, repeatedly speak of prohibitions

1 against sending commercial electronic text messages “by businesses.” *See, e.g.*, Final Bill Rep.,  
 2 S.H.B. 2007, at 2 (Wash. 2003) (“Commercial electronic text messages may not be sent **by**  
 3 **businesses** in the state of Washington . . . .”) (emphasis added);<sup>6</sup> H. Bill Rep., S.H.B. 2007, at 1  
 4 (Wash. 2003) (As Passed Legislature) (“Prohibits **businesses in the state of Washington** . . . .”  
 5 (emphasis added)).<sup>7</sup> There is no basis to interpret the statute as Plaintiffs urge.

6 Plaintiffs do not and cannot allege that businesses in Washington sent them the text  
 7 messages at issue. Therefore, Plaintiffs’ allegations fail to show that the individual senders  
 8 violated CEMA. *See* RCW 19.190.060(1) (“No person **conducting business in the state** may  
 9 **initiate** . . . the transmission of an electronic commercial text message . . . .”) (emphasis added).  
 10 Absent allegations sufficient to show that the senders violated CEMA, Plaintiffs necessarily fail  
 11 to allege that Robinhood had the requisite knowledge that those who Robinhood allegedly  
 12 “assisted”—the senders—were “engaged, or intend[ing] to engage, in any practice that violates  
 13 the [CPA]” through a CEMA violation. RCW 19.190.010(1). Accordingly, Plaintiffs’  
 14 allegations fail to support a necessary element of their “assistance” CEMA claim against  
 15 Robinhood.

16 **C. Plaintiffs’ Factual Allegations Fail to Establish that the Text Messages at  
 17 Issue Constitute “Commercial Electronic Text Messages.”**

18 Plaintiffs fail to state a claim for a third independent reason: The text messages Plaintiffs  
 19 allegedly received were not “commercial electronic text messages,” the only form of text  
 20 message that CEMA prohibits. *See* FAC ¶¶ 45, 54; RCW 19.190.060(1). “Commercial  
 21 electronic text message” is statutorily defined as “an electronic text message sent to promote real  
 22 property, goods, or services **for sale or lease**.” RCW 19.190.010(3) (emphasis added).

23 The court’s analysis in *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1128 (W.D.  
 24 Wash. 2012) is instructive. In that case involving a claim under CEMA, the plaintiff allegedly  
 25 received a text that stated “Get on Voxer” and provided the recipient a link to download

26 <sup>6</sup> Available at [https://lawfilesextract.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/2007-S\\_FBR.pdf?q=20220206154404](https://lawfilesextract.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/2007-S_FBR.pdf?q=20220206154404).

27 <sup>7</sup> Available at [https://lawfilesextract.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/2007-S\\_HBR.pdf?q=20220208213548](https://lawfilesextract.leg.wa.gov/biennium/2003-04/Pdf/Bill%20Reports/House/2007-S_HBR.pdf?q=20220208213548).

1 “Voxer,” a social networking app. *Id.* Like Robinhood, Voxer is a for-profit business. But the  
 2 *Hickey* plaintiff “nowhere alleg[ed] that consumers pay money” to download or use the Voxer  
 3 app. *Id.* at 1132. Dismissing plaintiff’s CEMA claim, the court held that CEMA means what it  
 4 says—a free app is not for “sale or lease.” *Id.* at 1132-33. A sale, the court noted, requires the  
 5 “passing of title from the seller to the buyer for” “*a price in money paid or promised.*” *Id.* at  
 6 1132 (emphasis added) (quoting RCW 62A.2-106 & *Sale*, *Black’s Law Dictionary* (9th ed.  
 7 2009)). That the transaction might involve some “intangible consideration” like “telephone data  
 8 charges or agreement to pay . . . in the future” was irrelevant. *Id.*

9       Like the text messages in *Hickey*, the ones Plaintiffs allegedly received did not promote a  
 10 product or service for sale or lease, and therefore were not “commercial electronic text  
 11 messages” prohibited by CEMA. Plaintiffs allege that Moore received a text message stating:  
 12 “Join Robinhood and we’ll both get a stock like Apple, Ford, or Sprint *for free.*” FAC ¶ 45  
 13 (emphasis added). Similarly, Plaintiffs allege that Gillette received a text message stating: “You  
 14 now have a claim to a stock like Apple, Ford, or Facebook.” *Id.* ¶ 54. Plaintiffs do not allege  
 15 that Robinhood customers pay money to “join Robinhood” by creating an account. Nor do  
 16 Plaintiffs allege that customers must provide “a price in money paid or promised” to trade  
 17 commission-free using their Robinhood accounts. Indeed, Moore previously admitted that  
 18 Robinhood’s refer-a-friend text messages—including the text message that he alleges he  
 19 received—promoted Robinhood’s free mobile application and commission-free investment  
 20 services. Dkt. 27 at 2 (conceding that Robinhood users “invest commission free in stocks,  
 21 exchange-traded funds, and options” and that “Robinhood does not earn money from  
 22 commissions”).<sup>8</sup> The text messages do not promote a service or good for sale.

23       Nevertheless, Plaintiffs’ Amended Complaint contains a number of new allegations  
 24 aimed at hurdling the “for sale or lease” requirement. The allegations fail to do so. *First*,

25       <sup>8</sup> Moore’s initial Complaint contained no allegations that consumers pay money for Robinhood’s services, and  
 26 instead alleged—correctly—that Robinhood users “invest commission free in stocks.” Compl. ¶ 1. Plaintiffs’  
 27 Amended Complaint conspicuously erases the words “commission free” from the same paragraph. *See* FAC ¶ 1. But the Amended Complaint still does not and cannot allege that Robinhood users must pay Robinhood anything in order to invest commission free.

1 Plaintiffs now allege that Robinhood users “pay” for commission-free trading “by trading at  
 2 inflated execution prices,” even though customers do not pay Robinhood any money when  
 3 conducting these trades. FAC ¶ 25. At the outset, this allegation does not describe a “sale or  
 4 lease” because it does not cost money to download the Robinhood app or to claim a referral  
 5 award. Regardless, Plaintiffs’ theory is also incorrect because Robinhood’s receipt of “payment  
 6 for order flow” does not constitute a sale to its customers. Plaintiffs incorporate two Securities  
 7 and Exchange Commission (“SEC”) documents with sections pertaining to “payment for order  
 8 flow” into their Amended Complaint to support these allegations, neither of which support a  
 9 conclusion that the referral text messages at issue offered anything “for sale or lease.” *Id.* n.7  
 10 (citing Robinhood Form S-1 (July 1, 2021) (“S-1”)),<sup>9</sup> n.8 (citing Admin. Proceeding File No. 3-  
 11 20171 (Dec. 17, 2020)) (“SEC Order”).<sup>10</sup> The S-1, which Robinhood filed with the SEC, states  
 12 that the majority of Robinhood Markets, Inc.’s revenue is transaction-based and includes  
 13 “payment for order flow,” meaning Robinhood Markets, Inc. receives “consideration in  
 14 exchange for routing [its] users’ equity, option and cryptocurrency orders to market makers for  
 15 execution.” S-1 at 10, 34. Notably, the “consideration” for these services is not paid by any  
 16 customer using Robinhood’s app, let alone recipients of referral text messages. Moreover, the  
 17 S-1 Registration Statement is explicit that “[c]ustomers do not need to provide any cash  
 18 consideration for the stock award” as a result of joining Robinhood via a referral. *Id* at 124.

19 The second document Plaintiff relies on is an SEC Order stating that “Robinhood, like  
 20 other retail broker-dealers, has received payment for order flow in exchange for routing its  
 21 customer orders to principal trading firms.” SEC Order ¶ 11. Based on the SEC Order,  
 22 Plaintiffs allege that Robinhood’s practices “resulted in worse execution prices for Robinhood  
 23 users—and for large trades the higher prices were higher than the commissions users would pay  
 24 elsewhere.” FAC ¶ 25. Although Plaintiffs admit that Robinhood “offers users trades without  
 25 stated commissions,” based on these supposedly inflated execution prices Plaintiffs allege that

26  
 27 <sup>9</sup> Available at <https://www.sec.gov/Archives/edgar/data/1783879/000162828021013318/robinhoods-1.htm>.

<sup>10</sup> Available at <https://www.sec.gov/litigation/admin/2020/33-10906.pdf>.

1 Robinhood users “pay for Robinhood’s ‘commission-free’ services.” *Id.* The SEC Order does  
 2 not support Plaintiffs’ theory. The SEC did not find that any Robinhood customers paid  
 3 “inflated” prices—i.e., prices higher than those quoted on the national public quotation feed (the  
 4 “NBBO”). SEC Order ¶ 12. To the contrary, the SEC found only that “certain Robinhood  
 5 orders” received less “price improvement”—the amount by which a price is *superior* to the  
 6 NBBO price—from market makers than they might have at other broker-dealers. *Id.* ¶ 42. The  
 7 SEC Order does nothing to undermine the fact that Robinhood customers—as Plaintiffs admit—  
 8 trade commission-free. Moreover, as Plaintiffs also admit, these supposedly inflated execution  
 9 prices are charged by “the principal trading firms” to which Robinhood sells its order flow, not  
 10 by Robinhood. FAC ¶ 25. In any case, the fact that Robinhood generates downstream revenue  
 11 due to its customers’ commission-free trading does not render that commission-free trading a  
 12 “sale” that Robinhood makes to its customers. *Hickey*, 887 F. Supp. 2d at 1132 (noting that a  
 13 “sale” is “a price *in money* paid or promised”) (emphasis added) (quoting RCW 62A.2-106 &  
 14 *Sale, Black’s Law Dictionary* (9th ed. 2009)).

15 **Second**, Plaintiffs allege that Robinhood offers an optional premium service, Robinhood  
 16 Gold, that customers can access for \$5 per month, and other services for additional fees, such as  
 17 a \$20 fee for delivering a check to a user. FAC ¶¶ 24, 26. However, Plaintiffs’ own screenshots  
 18 show that the text messages they allegedly received did not mention Robinhood Gold or any  
 19 other optional product or service that required the recipient to pay Robinhood. *Id.* ¶¶ 45, 54.  
 20 Although a court has held that a text message promoted services “for sale” where “the only  
 21 purpose of the offer was to promote or encourage the use of defendants’ [for-sale] taxi services,”  
 22 *Gragg*, 2013 WL 195466, at \*3,<sup>11</sup> here that is not the case: the text messages at issue do not  
 23 reference Robinhood Gold, and as Plaintiffs have admitted, no payment is required for customers  
 24 to trade commission-free using their free Robinhood account and free Robinhood app.

25 **Third**, Plaintiffs make various additional allegations about Robinhood’s customer base

26 <sup>11</sup> See also *Wright v. Lyft, Inc.*, 2016 WL 7971290, at \*4 (W.D. Wash. Apr. 15, 2016) (relying on *Gragg* and holding  
 27 under analogous facts that the only purpose of the text messages at issue were to sell the defendant’s ride-sharing  
 services to the text message recipients).

1 and revenue generation, allegations which do nothing to show that *the text messages at issue*  
 2 meet the “for sale or lease” requirement. For example, Plaintiffs allege that “[o]ver 80% of users  
 3 that join the platform join through the refer-a-friend program,” that “Robinhood’s revenue would  
 4 be adversely impacted” without new users generated through its referral program, and that  
 5 “Robinhood also charges miscellaneous fees to users who use its trading services.” FAC ¶¶ 22,  
 6 26. These allegations are insufficient to establish that the text messages Plaintiffs allegedly  
 7 received promoted a product or service “for sale or lease.” *See Hickey*, 887 F. Supp. 2d at 1132  
 8 (noting that “intangible consideration” like “telephone data charges or agreement to pay . . . in  
 9 the future” does not satisfy the “for sale or lease” requirement).

10 **D. Plaintiffs Should Not Be Given Further Leave to Amend.**

11 The defects in Plaintiffs’ claims cannot be cured by amendment, especially since  
 12 Plaintiffs have amended once already after seeing Robinhood’s initial motion to dismiss. Where  
 13 “the claim is not based on a proper legal theory, the claim should be dismissed.” *Rahman*, 2019  
 14 WL 3550314, at \*2 (citing *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983)).

15 Here, Plaintiffs’ legal theory is fatally flawed. *First*, Plaintiffs cannot remedy their  
 16 failure to allege facts sufficient to state a viable claim that Robinhood provides “substantial  
 17 assistance” to the senders of the refer-a-friend text messages Plaintiffs allegedly received,  
 18 because they have now twice admitted that Robinhood users—not Robinhood—decided whether,  
 19 when, how, and to whom to send the at-issue text messages. FAC ¶¶ 31-33. *Second*, Plaintiffs  
 20 cannot remedy their failure to allege facts sufficient to establish that the original senders of refer-  
 21 a-friend text messages were “conducting business” in Washington in connection with the text  
 22 messages at issue. *Third*, Plaintiffs’ admissions and allegations regarding the text messages at  
 23 issue show that those text messages did not promote a product or service for sale or lease, and no  
 24 volume of additional allegations regarding Robinhood’s revenues or business model will change  
 25 that.

26 **V. CONCLUSION**

27 For the foregoing reasons, the Court should dismiss Plaintiffs’ Amended Complaint with

DEFENDANT’S MOTION TO DISMISS PLAINTIFFS’ AMENDED  
 COMPLAINT (2:21-cv-01571-BJR) - 14  
 4863-4636-6988v.34 0114672-000005

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1 prejudice, and without leave to amend. Plaintiffs' CEMA claim is incurably flawed. Plaintiffs'  
2 CPA claim, which is premised on a CEMA violation, therefore also fails. Robinhood certifies  
3 that the parties have conferred pursuant to this Court's Standing Order for All Civil Cases. *See*  
4 Dkt. 44 at 3, 4.

5 DATED this 22nd day of February, 2022.

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